SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 676.

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, CLAYTON J. McPHAIL, BURT T. COOL and RICHARD A. ALTMEIER,

Petitioners,

v.

COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO, and THE HONORABLE JOHN J. CONNORS,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INTRODUCTORY STATEMENT.

In their Brief in Opposition to Petitioners' Petition for Writ of Certiorari, respondents argue that they have jurisdiction over the subject matter of the action pending before them and that the National Railroad Adjustment Board does not have jurisdiction of this action because, first, the petitioning railroad company is no longer a party to the action pending before them and, second, the Adjustment Board has no power to award punitive damages as claimed therein. These arguments were first raised in respondents' Brief. A reply thereto under Rule 24 (4) follows.

THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OF THE SUBJECT MATTER UNDER THE RAILWAY LABOR ACT.

I. Respondents cannot acquire jurisdiction by reason of the dismissal of the railroad company as a party to the action pending before them.

The admitted facts are set forth in paragraph 6 of the Petition for Writ of Prohibition filed in the Supreme Court of Ohio (reference the Appendix at page 15 of the Petition herein), the railroad company having been dismissed without prejudice as a party to the action pending before respondents upon motion of the aggrieved employee. The railroad company is of course the party respondent or employer in the pending submission before the Adjustment Board.

Respondents contend in their first point raised that they have jurisdiction and that the Adjustment Board does not have jurisdiction because "There is no railroad involved" (paragraph a, page 4 of respondents' Brief). Assuming, for the purpose of argument, that the Adjustment Board would not have jurisdiction if there were no railroad involved, nevertheless, the railroad company is a party to the pending submission before the Adjustment Board and it is a proper party to the pending action before respondents since at all times in question the individual petitioners herein "were acting in their official capacities as officials on behalf of the Shore Line" (paragraph 1 of the Petition for Writ of Prohibition at page 12 of the Appendix to the Petition herein). In the Statement of the Case on page 2 of their Brief, respondents state that the individual petitioners "were working in a managerial capacity for said railroad at the time of their deliberate

and intentional acts of conspiracy * * *." Since the officials who administered the discipline were admittedly acting within the scope of their employment, the railroad company is liable for any wrongful acts as a matter of law. Consequently, respondents cannot with reason contend that the railroad company is not liable and no longer a proper party to the action pending before them.

Respondents' argument raises the question of whether the employee in question has a separate cause of action for conspiracy against the officials of the railroad company who disciplined him, in addition to a cause of action for his suspension from service against the company before the Adjustment Board. Petitioners submit that he does not. He may label his cause of action a conspiracy, but it nevertheless arises out of the disciplinary proceedings. A trial by jury before respondents on the merits of the conspiracy charge will inevitably involve the identical factual issues of whether the discipline was warranted under the circumstances.

The Shore Line is obviously the real party in interest to this litigation involving the discipline of one of its employees. Its dismissal was merely a belated attempt to circumvent the exclusive jurisdiction of the Adjustment Board and a procedural sham on its face.

II. Respondents cannot acquire jurisdiction by reason of the claim for punitive damages in the pending action.

With regard to respondents' second point, to the effect that the Adjustment Board has no power to award punitive damages (paragraph b, page 4 of their Brief), this argument raises the related question of whether an employee has a separate claim for punitive damages as at common law, in addition to a cause of action for lost wages before the Adjustment Board. It is of course true that the

Adjustment Board does not have the power of a court of general jurisdiction as at common law, but Congress did not intend that it should have such power. Common law actions were precluded by the Act (reference the authorities cited on page 8 of the Petition herein). Although the issue has not been decided directly by this Court, petitioners submit that jurisdiction over employee disputes under the Act must rest upon the nature of the cause of action and not upon the nature of the relief sought.

CONCLUSION.

Petitioners submit that the Adjustment Board has exclusive jurisdiction over the aggrieved employees' cause of action regardless of whether the Shore Line is now a party to the action pending before respondents and regardless of whether there is a claim for punitive damages. Petitioners call to the attention of the Court that respondents have not cited any authority in support of their two arguments, other than the opinion of the Supreme Court of Ohio in this case, which is not in accord with decisions of this Court.

Petitioners urge this Court to grant certiorari in order to review again the jurisdictional question presented herein and the arguments raised by respondents in their Brief.

Respectfully submitted,

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